

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

Allstates Refractory Contractors, LLC,

Case No. 3:21 CV 1864

Plaintiff,

QUESTIONS FOR HEARING

-vs-

JUDGE JACK ZOUHARY

Martin J. Walsh, et al.,

Defendants.

Oral Argument is set for **Wednesday, June 29, 2022 at 10:00 AM**. Counsel may appear in person or by Zoom. At the hearing, this Court will address the jurisdictional issues raised in this case. Counsel should be prepared to answer the questions below at the hearing and provide this Court and opposing counsel any new case or legal citations ahead of time. This is not an invitation for further briefing.

1. Other district courts found they did not have jurisdiction over similar claims. Is this case a pre-enforcement action under 29 U.S.C. § 655(f)? How is this case different from *Elgin v. Department of Treasury*, 567 U.S. 1 (2012)?

2. Does *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994) not bar district-court review of this case?

3. Has *any* federal district court examined the merits of a constitutional challenge to OSHA or a similar claim?

4. Allstates claims it is “challenging the facial constitutionality of OSHA’s enabling statute, not its standards, rendering the [G]overnment’s jurisdictional objection beside the point” (Doc. 25 at 5). Is the constitutionality of OSHA’s authority “wholly collateral” to the statute’s review procedure? *See, e.g., Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 490 (2010) (“But petitioners object to the Board’s existence, not to any of its auditing standards. Petitioners’ general challenge to the Board is ‘collateral’ to any Commission orders or rules from which review might be sought.”).

5. Provisions for agency review do not restrict judicial review unless the “statutory scheme” displays a “fairly discernible” intent to limit jurisdiction, and the claims at issue “are of the type Congress intended to be reviewed within th[e] statutory structure.” *Thunder Basin Coal*, 510 U.S. at 207, 212 (citation omitted). Did Congress intend for challenges to the constitutionality of OSHA’s authority to promulgate safety standards to be reviewed administratively? Support your answer.

6. If this Court were to find it has jurisdiction in this case, is there a right to an interlocutory appeal?

IT IS SO ORDERED.

s/ Jack Zouhary
JACK ZOUHARY
U. S. DISTRICT JUDGE

June 1, 2022